

Order 96-10-37

**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

SERVED OCT 30 1996

Issued by the Department of Transportation
on the 24th day of October, 1996

Application of

NIPPON CARGO AIRLINES CO., LTD.

Docket OST-96-1692

for an exemption under 49 U.S.C.
section 40109

ORDER GRANTING EXEMPTION

Summary

In this order we are granting Nippon Cargo Airlines Co., Ltd. (NCA), a foreign air carrier of Japan, exemption authority to (1) conduct scheduled all-cargo services between Japan and Anchorage, Alaska; (2) serve its currently authorized points in the United States from any point or points in Japan; and (3) serve all of its authorized U.S. points (including Anchorage) as coterminal points. In addition, we are renewing certain other exemption authorities held by NCA to conduct various all-cargo services between Japan and the United States.¹

Background

During April 1996, the United States and Japan entered into a Memorandum of Understanding relating to all-cargo services between the two countries (1996 MOU).² The 1996 MOU provides for, among other things, a number of new all-

¹ NCA holds a foreign air carrier permit issued by Order 90-4-4, which authorizes it to engage in scheduled all-cargo services between Tokyo, Japan, and the coterminal points San Francisco and New York; and authority to conduct all-cargo charters in accordance with Part 212 of the Department's rules. NCA also holds various exemptions to perform all-cargo services between specified points in Japan and the United States. See Orders 96-6-27 and 95-12-13.

² The 1996 MOU was signed April 16, 1996, and became effective on August 21, 1996.

cargo services and increased frequencies which may be operated by NCA in the U.S.-Japan market.

Application

By application filed September 11, 1996, NCA requests new exemption authority consistent with the provisions of the 1996 MOU and renewal of existing exemption authorities to conduct various other all-cargo services in the Japan-U.S. market. Specifically, NCA seeks initial exemption authority to engage in scheduled all-cargo services between Japan and Anchorage, Alaska; serve its currently authorized points in the United States from any point or points in Japan; and serve all of its authorized U.S. points (including Anchorage) as coterminal points. In addition, NCA seeks to renew its existing exemption authorities to conduct scheduled all-cargo services (1) between Osaka, Japan, and the coterminal points Chicago and New York; (2) between Tokyo and Chicago and to coterminalize that service with its existing New York services; and (3) between Tokyo and Los Angeles, and to coterminalize that service with its existing San Francisco services.³ NCA requests that these authorities be granted for a period of not less than one year.

In support of its requests, NCA states that the authorities requested are consistent with the appropriate MOU or ROC between the United States and Japan, it has been designated by the Government of Japan to perform each of the proposed services, and its services will benefit the traveling public.⁴

Responsive Pleadings

On September 26, 1996, Federal Express Corporation filed an answer. FedEx states that we should defer action on NCA's request until the next round of consultations with Japan or until the United States takes appropriate action against the Government of Japan for its failure to honor its obligations under the

³ NCA's Osaka-Chicago/New York exemption authority was last granted October 13, 1995, for one year, and confirmed by Order 96-6-27. That authority was granted consistent with the provisions of the 1995 Record of Consultations (1995 ROC) between the United States and Japan. NCA's Tokyo-Chicago and Los Angeles authority was last granted December 6, 1995, for one year, and confirmed by Order 95-12-13. That authority was granted consistent with the provisions of the 1985 Memorandum of Understanding (1985 MOU) between the United States and Japan.

⁴ By Diplomatic Note (P-82) dated August 29, 1996, the Government of Japan selected Anchorage as one of the three points in the United States to be served by NCA pursuant to I.A.2.(c) of the 1996 MOU.

Agreement. Specifically, FedEx states that the Government of Japan has refused to take favorable action on FedEx's requests to perform bilaterally-authorized

fifth-freedom services beyond Japan. FedEx notes that in Order 96-7-22, the Department, in response to Japan's refusal to authorize FedEx to perform bilaterally-authorized services, tentatively found that Japan Air Lines' foreign air carrier permit should be amended by imposing fifth-freedom restrictions on JAL's all-cargo services. FedEx further states that NCA's application is incomplete and fails to comply with the content requirements for exemption applications set forth in the Department's procedural regulations.⁵ Specifically, FedEx argues that NCA's application does not provide basic information such as equipment type, type and frequency of service, and effective date of the proposed service.

On October 7, 1996, NCA filed a reply. NCA argues that deferral of its requests would constitute a violation of the 1996 MOU and would stand in sharp contrast against Japan's grant to United Parcel Service of new authority under the MOU. In response to FedEx's concerns that its application is incomplete, NCA states that it uses B-747 aircraft on all its Japan-U.S. services, and notes that October 28, 1996, is the effective date of its proposed services.

October 15 and 16, 1996, respectively, United Parcel Service and FedEx filed responsive pleadings.⁶ UPS urges us to grant NCA's requests, particularly the authority which relates to NCA's services under the 1996 MOU. UPS states that the Government of Japan acted promptly and favorably on its request to conduct U.S.-Japan all-cargo services under the 1996 MOU, and the United States should act similarly on NCA's requests. FedEx states that NCA's application remains deficient, citing NCA's failure to specify points in Japan it plans to serve and the frequency of the proposed service. FedEx further states that NCA has not demonstrated that its services would be in the public interest.

No additional pleadings were filed in response to NCA's requests.

Decision

⁵ See 14 CFR section 302.402. FedEx further states that deferral of the application will not prejudice NCA because the authority it seeks to renew continues in effect under 5 USC 558(c), and NCA has not provided a service proposal for the new authority.

⁶ UPS and FedEx filed motions to file otherwise unauthorized documents. We grant the motions of UPS and FedEx.

We have decided to grant NCA's requests by incorporating all of NCA's authorities in this proceeding, for either new and renewed authority, into a single route. Specifically, we are granting NCA exemption authority to engage in scheduled foreign air transportation of property and mail between any point or points in Japan and the coterminal points Anchorage, Alaska; San Francisco and Los Angeles, California; Chicago, Illinois; and New York, New York. The authority granted will be for a period of one year, and subject to the terms and conditions of the appropriate MOU or ROC and NCA's foreign air carrier permit.

We find that grant of these authorities is consistent with the public interest. The authorities requested are provided for in the pertinent MOU or ROC, and NCA has been designated by the Government of Japan to perform the proposed services.

While we are concerned by Japan's failure to authorize FedEx to perform bilaterally-authorized services beyond Japan, we believe that the appropriate course of action is to grant NCA's request while we seek to resolve FedEx's concerns. As FedEx correctly notes, we have already instituted a proceeding to address its concerns. In that proceeding, we tentatively found that we should amend the foreign air carrier permit of Japan Air Lines to preclude it from carrying certain Asian-U.S. cargo on its scheduled flights from Japan to the United States.⁷

Regarding FedEx's argument that NCA's application remains deficient, we note that the request is, at this time, substantially complete with respect to the requirements of 14 CFR Part 302, and forms a record sufficient to support a finding that the requested authority is consistent with the public interest. Specifically, while we expect foreign carrier applicants to comply fully with the requirements of Part 302, we find that, in this instance, the information that the carrier failed to provide (concerning points in Japan and frequencies) is not essential to our determination that the request is consistent with the terms of our relevant intergovernmental undertaking with Japan and to our public interest finding.

Based on the foregoing, we find that our action is consistent with the public interest and does not constitute a major regulatory action under the Energy Policy and Conservation Act of 1975.

ACCORDINGLY,

⁷ See Order 96-7-22.

1. We grant Nippon Cargo Airlines Co., Ltd. an exemption from section 41301 of Title 49 of the U.S. Code to permit it to engage in scheduled foreign air transportation of property and mail between any point or points in Japan and the coterminal points Anchorage, Alaska; San Francisco and Los Angeles, California; Chicago, Illinois; and New York, New York;
2. The authority granted above shall be effective for one year from the service date of this order;
3. The authority granted above is subject to the conditions of Nippon Cargo Airlines' foreign air carrier permit (Order 90-4-4), the 1996 MOU, the 1995 ROC and the 1985 MOU :
4. We grant the motions of United Parcel Service and Federal Express Corporation to file otherwise unauthorized documents;
5. To the extent not granted, we deny any additional requests for relief in Docket OST-96-1692;
6. We may amend, modify or revoke this authority at any time and without hearing; and
7. We will serve a copy of this order on Nippon Cargo Airlines Co., Ltd.; Federal Express Corporation; United Parcel Service; the Embassy of Japan in Washington, D.C.; the Department of State (Office of Aviation Negotiations) and the Federal Aviation Administration (SF-IFO).

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)